Supreme Court of the United States

October Term, 1923—No. 972 (New No. 275)

NEW YORK, PHILADELPHIA & NORFOLK TELEGRAPH COMPANY,
Plaintiff-in-Error,

—vs.—

JOHN I. DOLAN, Collector of Taxes for the Southern District of the
of Wilmington,
Defendant-in-Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF DELAWARE

SUPPLEMENTAL BRIEF FOR PLAINTIFF-IN-ERROR

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BYRON AND BRIGGS, INC., PRINTERS, NEW YORK

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Doubtless every plaintiff-in-error, after oral argument, feels that he failed to present the issues to the court clearly; and this is particularly true in this case.

The points of law involved are

(1) This court is not bound by the decision of the State Court that the Delaware statute is a privilege tax; but this court should determine that question for itself, because whether the statute be a property tax or a privilege tax controls the validity of the statute under the 14th Amendment.

(2) The tax provided by the statute is a property tax and, as such, taxes the property of this telegraph company without due process of law. The factor in due process which is lacking is the opportunity to be heard on the question of the minimum value of our property; and the property taken is the amount of the tax itself, for which judgment has gone against us in the State Court. The validity of the tax, under the Due Process Clause, is not dependent upon whether or not the particular property involved in this case was overvalued or undervalued; the validity of the statute depends, not upon what *has* been done under it, but what *might* be done under it. The imposition of an arbitrary valuation on property is a denial of due process and the tax imposed upon such an illegal valuation is a taking of property to the extent of the tax itself.

Whether or not the Delaware Legislature intended to reach the company's license with this tax, the tax is in fact imposed on the company's property and must be tested by property tax rules. This tax is distinguished from privilege taxes which are merely measured by the corporate property as a going concern, because in none of those cases did the State go so far as to fix an arbitrary value on the property. When a privilege tax is calculated on property, the constitutionality of the method of calculation must be determined by property tax rules; one of which is that the taxpayer must be heard upon the question of value. For example: a tax on a lawyer's license to practice, measured by an arbitrary value fixed by the state upon his office furniture,

would be unconstitutional, under the Due Process Clause.

(3) But even if the tax be a privilege tax, it yet denies us the equal protection of the laws; because it unreasonably discriminates against telegraph companies by fixing a minimum value on their property and not on property generally.

(4) As this record is before the court on a Federal question, questions of state law are also subject to review. Article 8, Section 1 of the Delaware Constitution provides:

> "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, but the General Assembly may by general laws, exempt from taxation such property as in the opinion of the General Assembly will best promote the public welfare."

It cannot be said that this Delaware tax statute is a uniform law or a general law; because it is limited in application to telegraph companies and a few other corporations. See *Greene v. Louisville & Interurban R. R. Company*, 244 U. S.; 499, 61 L. E.; 1280.

The city's declaration simply alleges the telegraph company's ownership of 3 1/2 miles of poles and wires in the streets and the assessed valuation thereof and the taxation thereon, at a certain rate and finally the amount of the tax thus calculated. The company filed a general demurrer to this declaration attacking the sufficiency thereof under both the State and the Federal

Constitutions. The trial court overruled the demurrer whereupon the telegraph company appealed to the Supreme Court of Delaware, assigning as error the insufficiency of the statute under both the State and Federal Constitutions. The Supreme Court of the State affirmed the trial court.

The assignment of errors in this court specifically relies upon the Due Process and Equal Protection Clauses of the Federal Constitution and then generally assigns as error (1) the overruling of the demurrer, (2) the affirmance of the judgment of the trial court and (3) the decision that the company is liable for the taxes. These assignments, although general in terms, relate back to the specific assignment of error which brought specifically before the Supreme Court of Delaware the insufficiency of the statute under the State Constitution; and so that state question is now before this court.

This is a "plain error" within the meaning of Rules 21 and 25.

Strange to say there has been no decision of the Supreme Court of Delaware under this provision of the State Constitution, which is germane to the point now raised. The question is one of novel impression in the state jurisprudence. This statute should be held to violate the State Constitution as in *Greene v. Louisville, etc., R. R., supra.*

The argument on the facts contained in our original brief may properly be amplified by the following remarks concerning property and privilege taxes in Delaware.

In an act, providing for the valuation of real

and personal property within the state, and an Act Concerning the Levy Court * * * Assessors, Collectors, etc., appearing in Volumes 1 and 2, Laws of Delaware, and republished in the codes of 1829, 1852, 1876 and 1893 respectively, appear the entire machinery for the assessment and collection of property taxes throughout the State of Delaware for the last 200 years. In those volumes is found the entire system of Delaware tax legislation, and it is against that background that the 1913 Amendment to the Wilmington Charter should be viewed.

Those early statutes provide in substance that all real and personal property within the state shall be assessed and the assessments returned to the levy court to which appeals may be taken by the taxpayers. In recent years, assessors have been abolished and in their stead have been created Boards of Assessment, Revision and Appeals which make the assessments, hear appeals therefrom and revise the taxes in their discretion.

An examination of those early statutes shows that, for more than 100 years, in Delaware the only method of property taxation has always embodied the very provisions contained in the Wilmington Charter before Section 80 was amended in 1913; those provisions being (1) assessment of the value of property, (2) a tax applied to the assessed value "according to a certain rate in and upon every $100 of the assessment" and (3) the right of appeal from the assessment. From the earliest period of the State's history to this date, the only real difference between the 1913 Amendment to Sec-

tion 80 of the city charter and the State's general property tax laws consists in this: that the 1913 Act taxes telegraph poles and wires by imposing an arbitrary minimum value upon the property, whereas the general property tax acts assess property such as houses, lands and personal property "at their true value in money" and afford the property owners the right of appeal from the assessment.

The Delaware Tax Laws have also always provided for privilege taxes. But they are clearly distinguishable from property tax statutes in that the privilege taxes are always imposed in specific sums, rather than in indefinite sums determined by a tax rate imposed upon an assessed valuation. An example of such a privilege tax statute is found in Volume 18, Laws of Delaware, page 561. This statute, entitled "An Act taxing Telegraph Companies doing business in this State" is now in force and imposes a state franchise tax on telegraph companies. This is a representative privilege tax statute and the difference between its terms and that of the 1913 Amendment to Section 80 of the City Charter is readily apparent.

> "SECTION 1. That every * * * corporation owing * * * any line or lines of telegraph * * * within this State, shall be subject to taxation for the use of the State in the following manner, viz: Each such * * * corporation shall annually * * * pay to the State Treasurer for the use of the State, a tax of sixty (60) cents per mile, for the longest wire within the State; a tax of thirty (30) cents per

mile for the next longest wire, and twenty (20) cents per mile for each and every other wire owned, maintained and operated within the state."

The striking fact which stands forth from a consideration of the two kinds of tax statutes in Delaware is this: That whenever a statute has imposed a tax on property, it has provided that the value of the property shall be ascertained by appraisment and the tax shall be calculated at a certain rate on every hundred dollars of the assessed valuation; but where the tax has been imposed on a privilege, the statute has imposed a specific amount of tax and this is directed against the persons, owners or occupiers of the property. That is, a privilege tax is always in a specific sum and is levied on the persons owning or occupying the property and not the property itself. The 1907 Amendment to Section 80 of the City Charter is thus levied on the persons operating the property and the tax is in a specific amount; whereas the 1913 Amendment is levied upon the property itself and in an indefinite amount to be determined by the application of a given tax rate to an arbitrary valuation.

The deadly parallel is a ready means of contrasting the Acts of 1907 and 1913 and showing the glaring difference between the two.

ACT 1907	ACT 1913
First Paragraph. [Objects Taxed & Amount of Tax.]	Corresponding Paragraph. [Objects taxed–Amount not Determined.]
The Mayor and Council of Wilmington is hereby given express authority to collect and receive annually "from *telegraph,* telephone * * * companies * * *."	"All * * * *telegraph poles and wires* located on the public streets in the City of Wilmington or on private property not otherwise taxed * * * shall be *assessed* in the following manner," and taxed on that assessment.
(a) From all persons, firms, associations, or corporations owning or operating any street railway * * * $200 per mile.	(a) "All street railways shall be assessed per mile" * * * and taxed on that assessment.
(b) From all persons, firms, associations or corporations owning or operating any gas company * * * $60 per mile.	(b) "All gas mains * * * shall be assessed per mile" * * * and taxed on that assessment.
(c) From all persons, firms, associations or corporations owning or operating any electric light company * * * $100 per mile.	(c) "All electric light, telephone or telegraph poles and wires overhead * * * located in the streets of the City of Wilmington shall be assessed per mile" and taxed on that assessment.
(d) From all persons, firms, associations or	(d) All heat, light and power poles, wires,

corporations owning or operating * * * telegraph company business within the limits of the City of Wilmington * * * $100 per mile overhead.

(e) From all persons, firms, associations or corporations owning or operating any telegraph or telephone lines underground * * * $60 per mile.

(f) From all persons, firms, associations or corporations owning or operating heat, light or power companies overhead, $60 per mile.

(g) From all persons, firms, associations or corporations owning or operating water mains underground, $60 per mile.

After said Paragraphs, said Act of 1907 provides:

Paragraph 3, Act of 1907:

"The taxes provided for by this amendment shall be in lieu of and instead of all other taxes, license and revenue imposed, required or derived from any

&c. "shall be assessed per mile" and taxed on that assessment.

(e) "All telephone, telegraph or electric light, underground conduits or wires, &c., shall be assessed per mile" and taxed on that assessment.

(f) All underground water pipes or conduits * * * located in the streets of the City of Wilmington "shall be assessed per mile" and taxed on that assessment.

After said Paragraphs, said Act of 1913 provides:

"Any light company which uses the same system or materials for furnishing heat, light and power *shall not be doubly assessed on the same construction.*"

conduits, pipes, mains, ducts, wires, roadbeds, t r a c k s, ties, poles, cables, lamps, lights, and all other equipments, materials and apparatus belonging to any such persons, firms, associations or corporations, in, or placed in, on or over the streets of the City of Wilmington."

The last provision in the Act of 1913 above quoted, providing against double taxation, is a clear indication that the tax is upon the property and not upon the privilege of using that property. It shows that the electric light poles and wires are taxed, rather than the privilege of using them, because it is provided that the same poles and wires shall not be taxed twice if used by different persons. Moreover, it should be noted that in the Amendment of 1913 the tax is to be assessed and collected by assessors and collectors, although under the general taxation system of Delaware neither assessors nor collectors have anything to do with privilege taxes, but are concerned only with property taxes.

We submit that if it is decided that the tax provided in the Act of 1913 is a tax on privilege, rather than upon property, this will recognize a clear departure from the usual form of privilege tax adopted in Delaware since the Colonial origin of that state; and it will, for the first time, present a privilege tax levied not upon persons or businesses, but upon property; and

not in a specific amount, but in an indefinite amount which is calculated by applying a tax rate to an assessed valuation.

For the foregoing reasons and the reasons contained in our original brief, we earnestly contend that the judgment of the Supreme Court of Delaware should be reversed.

Respectfully submitted,

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Counsel for Plaintiff-in-Error.

(7262)

HIGGINS AND HIGGINS, INC., PRINTERS, NEW YORK

IN THE

Supreme Court of the United States.

No. 275 October Term, 1922.

NEW YORK, PHILADELPHIA & NORFOLK TELEGRAPH COMPANY,
Plaintiff-in-Error,

v.

JOHN I. DOLAN, Collector of Taxes for the Southern District of the City of Wilmington.

In Error to the Supreme Court of the State of Delaware.

Brief for Defendant-in-Error.

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CONTENTS.

CASES.

CASES—Continued.

IN THE

Supreme Court of the United States.

October Term, 1922. No. 972.

NEW YORK, PHILADELPHIA & NORFOLK TELEGRAPH COMPANY,
Plaintiff-in-Error,

v.

JOHN I. DOLAN, COLLECTOR OF TAXES FOR THE SOUTHERN DISTRICT OF THE CITY OF WILMINGTON.

BRIEF FOR DEFENDANT-IN-ERROR.

I.

STATEMENT.

The statement of facts contained in the brief for the plaintiff-in-error is substantially correct respecting the facts and history of the litigation. There are several matters throughout the brief of the plaintiff-in-error which make it necessary to direct the Court's attention to the exact facts shown in the record. The cause arose on an action of debt and the essential elements of the declaration are that the defendant-in-error is one of the tax collectors for the Mayor and Council of Wilmington, a municipal corporation of the State of Delaware; that the plaintiff-in-error is a corporation of the State of Delaware and at the times mentioned was using poles and wires in streets of the city of Wilmington, Delaware, in its business as a telegraph company; that by virtue of Section 80, Chapter

207, Volume 17, Laws of Delaware, as amended, by Section 1, Chapter 205, Volume 27, Laws of Delaware, the proper officials of the city of Wilmington assessed at the rate of seventy-three hundred dollars per mile, the three and one-half miles of poles and wires owned, operated and used by the plaintiff-in-error in its business as a telegraph company in the streets of the said city of Wilmington; that in accordance with law the tax rate was duly determined and that taxes for the years 1913 to 1918, inclusive, were thereupon assessed, which taxes by reason of the nonpayment thereof became subject to certain penalties set forth in the record (p. 11); and which tax and penalties the plaintiff-in-error refused to pay. This declaration was demurred to. The demurrer was overruled and final judgment was taken thereupon and the case taken to the Supreme Court of Delaware upon the facts disclosed in the declaration and admitted by the demurrer.

There is nothing in the record to show in any manner whatsoever that the plaintiff-in-error was at the time the above-mentioned taxes were levied and assessed, engaged in the business of interstate commerce. This statement becomes necessary by reason of the fact that there appears in the petition for the writ of error, in the second paragraph thereof (Record, p. 1) a statement to the effect that the plaintiff-in-error was during the time above mentioned engaged in the business of transmitting intelligence by wire between various points in the United States, both within and without the State of Delaware to various other points within the United States, both within and without the State of Delaware. So far as a careful examination of the record reveals, there is nothing in the record of the proceedings originally instituted in the Superior Court of the State of Delaware, in and for New Castle County, which will justify this statement.

It further appears from the declaration aforesaid (Record, pp. 9-11) that there is nothing that indicates in any manner whatsoever that the plaintiff-in-error was entitled to any of the rights, privileges or benefits which a telegraph company may acquire under the Act of Congress of July 24, 1866, 14 Statutes at Large 221, Revised Statutes, Section 5263 *et seq.* and the amendments thereof known as the Post Road Act. A statement of this fact becomes necessary by reason of the fact that throughout a certain portion of the brief of the plaintiff-in-error authorities are cited and the argument assumes that for the purposes of this case the plaintiff-in-error is entitled to the benefits accruing to it under said act.

It further becomes necessary to call attention to the fact that no testimony was taken in the cause and there is no evidence in the record to show whether or not the amount of the tax levied and assessed is confiscatory. This statement becomes necessary because authorities are cited throughout the brief of the plaintiff-in-error and it is apparently urged that the amount of the tax is so large as to deprive the plaintiff-in-error of its property without due process of law.

II.

LAW.

Interpretation of the Statute.

The original act to which the statute under consideration is an amendment constituted substantially a revised charter for the city of Wilmington. This act was Chapter 207, Volume 17, Laws of Delaware and its title was: "An Act to Revise and Consolidate the Statutes Relating to the City of Wilmington."

Section 80 of this statute related to the assessment of real estate within the city and did not assume to tax anything other than real estate. The power of the city of Wilmington to tax telegraph companies was contained in Section 100 of Chapter 207, Volume 17, which authorized the Mayor and Council to levy and collect taxes upon telegraph poles and other erections of like character erected within the city of Wilmington and granted the Council power by ordinance to prescribe the mode of levying and collecting the same. This statute further provided that if the taxes should not be paid, the Council should have power to cause the same to be removed and might institute suit to recover the amount of taxes levied. The first departure from this statute was contained in Section 16, Chapter 177, Volume 24, Laws of Delaware, approved March 25, 1907, wherein provision was made for the taxation of telegraph companies by an amendment to Section 80 aforesaid, which as we have seen originally applied only to real estate. This amendment (Section 16, Chapter 177, Volume 24) authorized the laying of taxes upon various companies, such as street railway, gas, electric light, telephone or telegraph companies. These companies were required to pay certain designated sums per mile for each mile of the streets of the city of Wilmington used by such companies for their wires, poles, mains, etc. The said statute provided for a smaller tax per mile in the case of underground conduits for telegraph companies than it did for overhead wires. The amendment of 1907 was clearly a license tax for the use and occupation of the streets. The amendment above mentioned continued in force until the Act of April 7, 1913, being Chapter 205, Volume 27, Laws of Delaware, which act required the insertion after the word "Companies" in the tenth line of Section 80 of

the original statute (Chapter 207, Volume 17, Laws of Delaware) the provisions of the amendatory act.

The Supreme Court of Delaware determined that the amendnent of 1913 (Chapter 205, Volume 27) was in substitution for the amendment of 1907 (Chapter 177, Volume 24) and the decision of the Supreme Court of Delaware having relation solely to the effect of the Act of 1913 upon the Act of 1907 is conclusive and not subject to review by this court. The plaintiff-in-error and the defendant-in-error are agreed upon this point.

It therefore appears that since the Act of 1907 there has been embodied in original Section 80 (Chapter 207, Volume 17), which as we have seen originally related only to taxation on real estate, provisions for the taxation of telegraph companies, which apparently have no relation to the subject matter of the original section. No complaint was made by the plaintiff-in-error to the tax assessed under Section 16, Chapter 177, Volume 24, the 1907 Act, notwithstanding this tax provision was introduced into a section dealing originally only with real estate taxation. Complaint is made, however, by the plaintiff-in-error to the present amendment (Chapter 205, Volume 27) on the ground that tax there imposed is a tax upon property and is invalid because no notice or hearing was afforded it. We contend that the whole background of the present statute necessarily leads to the conclusion that the purpose and intent of the statute is merely to change the method of ascertaining the amount of tax which the telegraph company should be required to pay for its occupancy of the streets of the city of Wilmington.

In this connection it is submitted that Section 100 of the original act (Chapter 207, Volume 17) is still in force and unless it should appear that the plaintiff-in-error is entitled to the privileges of the Federal Post Road Act, which does not appear in this case, the city

would be empowered to cause the removal of the poles, since this provision respecting removal appears not to be inconsistent with the later amendments to Section 80.

It becomes necessary to ascertain from the internal evidence contained in this statute as well as the history thereof the proper interpretation which should be given thereto. It appears first that the tax is levied not upon any quantum of property, since it is the mileage of streets occupied by the plaintiff-in-error which is the basis of the assessment. The plaintiff-in-error might have as many wires, poles, conduits or other necessary and proper facilities in connection with its system as it might deem fit and necessary, but whether it has one wire or one thousand wires makes no difference respecting the basis of the tax.

It further appears from the statute under construction that the company subject to tax is required on the first day of April in each year to file with the clerk of Council of the city of Wilmington the sworn statement setting forth the total number of miles of the streets of the city of Wilmington used by such corporation in its business. No requirement is made that this statement shall contain the number of wires, poles, conduits or other facilities or accessories, nor the value thereof. It is upon the statement so furnished by the company that the assessment is determined by the board of assessment, revision and appeals.

It further appears that the statute provides that in case of telegraph companies using underground conduits, the basis of ascertaining the tax shall be considerably less than in the case where overhead wires are used. This is a clear indication that the value of the property was not to be the test in ascertaining the tax, but that the tax was laid for the privilege of using the streets; the use of the streets by underground con-

duits would be less burdensome to traffic thereon and require less cost of supervision and inspection, and in consequence thereof a smaller base is fixed. We believe it would be admitted without contention that the cost of installing underground conduits for telegraph wires would be very much in excess of the cost of placing poles and stringing wires thereon and that from all considerations affecting value, the value to be attributed to underground conduits for telegraph wires would necessarily be far in excess for taxation purposes of such value for overhead wires. This consideration is an internal circumstance which leads strongly to the conclusion that the tax is not placed upon value.

It further appears from Section 1, Chapter 205, Volume 27, Laws of Delaware:

> "The assessment of real estate shall be made according to a certain rate in and upon every hundred dollars of the estimated value of the property assessed, if sold for cash, and so *pro rata*. All assessments upon real estate shall be so made as to show separately the valuation of the improvements upon and the total valuation of the property assessed, and such property shall be described with such particularity as will enable it to be clearly identified, and the name of the owner, or last owner or reputed owner shall be given, if known."

The section further provides that the board of assessment, revision and appeals shall cause tax maps and other records to be made.

The above-mentioned provision of the statute under construction, wherein a telegraph company is required to file a sworn statement showing the total mileage of streets of the city of Wilmington used by it in its business, seems to provide a means of determining the amount of the tax which is wholly inconsistent with the idea that it is a real estate tax and likewise wholly

inconsistent with the methods designated and required for the ascertainment of the assessment upon real estate. Certainly no one could contend that the property of a telegraph company could be sold for taxes but the provisions relating to assessment of real estate require the assessment to be made upon a value at which the property could be sold for cash. Furthermore, in the return filed by the telegraph company, no improvements are required to be stated, as they are required to be separately stated in the case of a real estate assessment; and the act further requires in the case of a real estate assessment that it shall be made so as to show separately the valuation of the improvements and the total valuation of the property assessed. In view of these considerations to be gathered from the contents of the statute itself, it would seem very clear that no matter how informal the statute may be, is clear and proper construction is that the tax upon the telegraph company is a license tax or an occupation tax for the privilege of using the streets of the city.

It may be urged that the minimum of $6600 per mile and the maximum of $7300 per mile indicates that the tax is a property tax. The answer to such contention is that evidently the legislature having empowered the board of assessment to revise the taxation of property and change from time to time the assessments thereof, deemed it wise to permit the board of assessment at the same time to alter the amount to be paid by the telegraph company. It would seem only logical and fair that if real estate values facing upon a certain street have risen in value so that the board of assessment would deem it proper to raise the assessment upon property owners, that the telegraph company occupying the streets upon which the property of individuals might face should likewise be held to the payment of a larger tax, on the theory that the

right to occupy the streets was of more value to them under such circumstances. Furthermore the maximum and minimum limits permitted to the board of assessment under the statute are also justifiable upon the theory that a telegraph company should be required to pay a greater license tax for occupying streets in a congested section of a city than it would be required to pay for occupying streets in the outlying districts of a city. Our contention is that the legislature has fixed the tax in this statute and the plaintiff-in-error cannot complain if the legislature as a matter of grace has recognized that under the circumstances last mentioned the telegraph company should in fairness not be held to the payment of the same tax in an outlying district that it would be properly required to pay in a thickly populated or congested district. There can be little doubt that if the legislature had fixed the base for the determination of the amount to be paid by the plaintiff-in-error at $7300 per mile and had left no discretion in the board of assessment by which they might be permitted to reduce that valuation for the purpose of ascertaining the tax, that this would be clearly a privilege tax specified and determined by the legislature and cannot be subject to any constitutional objection under the facts present in this case.

The summary of our contention is that under a proper interpretation of the statute, the plaintiff-in-error is required to pay a license tax or a privilege tax for the right to occupy the streets of the city. Furthermore, the plaintiff-in-error being a corporation of the State of Delaware and it not appearing that it is engaged in interstate commerce, or is entitled to any of the privileges under the Federal Post Road Act, the tax can also be sustained as a franchise tax upon the right of the corporation to conduct its business in the city of Wilmington.

A Municipal Tax Imposed Upon the Right to Occupy the Streets of the City is Valid.

Special attention is called to the fact that the statute under construction imposes the tax upon the telegraph poles and wires used as telegraph lines located in the streets of the city of Wilmington on a basis of so much per mile or fraction thereof, instead of imposing the tax at so much per pole as is done in many of the cases herein cited. The tax is imposed upon the poles in the aggregate located on each mile of the city streets.

In view of the fact that neither interstate commerce nor the Federal Post Road Act relating to telegraph companies is involved in this cause, it would seem to require no citation of authority for the proposition that the legislature of a state is fully empowered to grant to a municipality thereof the right to lay a tax upon the privilege of using the streets of the city for the purpose of conducting a business thereon, or for the purpose of occupying the streets of the city with its poles and wires. Of course such tax must not be confiscatory but as above shown that question is not involved in this case. In cases wherein the interstate commerce clause and the Federal Post Road Act have been involved, the Supreme Court has nevertheless held such taxations valid.

In City of St. Louis v. Western Union Telegraph Company, 148 U. S. 92, 37 L. Ed. 380, a charge imposed by the city of St. Louis upon the telegraph company for the privilege of using its streets measured by the amount of such use was held to be valid as an occupation tax in the nature of a rental. This case was followed and approved in the case of Postal Telegraph Cable Co. v. Baltimore, 156 U. S. 210, 39 L. Ed. 399.

In Mackay Telegraph & Cable Co. v. Little Rock, 250 U. S. 94, 63 L. Ed. 863, the Court said:

> "These cases establish that a City (supposing, of course, it acts under the authority of the State) may impose such taxes not merely with respect to the special and exclusive occupancy of streets and other public places by poles and other equipment, but by way of compensation for the special cost of supervising and regulating the poles, wires and other fixtures and of using the necessary permits."

In Postal Telegraph Cable Company v. Richmond, 249 U. S. 252, 63 L. Ed. 590, an annual license tax for the privilege of doing business within the city limits by a telegraph company, not including interstate business and Government service, may by authority of the state be imposed by a municipality where such tax does not burden interstate commerce. As previously pointed out no question of interference with interstate commerce is involved in this case. In the case above cited the license tax was in the sum of three hundred dollars "for the privilege of doing business within the City of Richmond" excluding therefrom business done without the state and also business done for the Government of the United States, its officers and agents and in addition an annual fee of two dollars per pole was imposed for each telegraph pole which the company maintained or used in the streets of the city. The Court said:

> "Such tax is . . . an exercise of the police power of the State for revenue purposes restricted to internal commerce and therefore within the taxing power of the State."

See also:

Williams v. Talladega, 226 U. S. 404, 57 L. Ed. 275;

Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692, 38 L. Ed. 871.

No Notice or Hearing Was Required to be Given to the Plaintiff-in-Error in This Case.

McGehee, Due Process of Law, pages 235, 236, says:

> "The right to notice and a hearing does not exist as to any matter which the legislature rightfully determines in providing for the tax. We have seen that the right to select the subjects and the method of taxation is inherent in and inseparable from the taxing power. The selection of the subjects of taxation, especially where the tax is a local one or a special assessment in return for benefits, may involve an adjudication that particular property is liable to the tax, and the selection of a particular method of taxation, for instance, a specific instead of an *ad valorem* tax, may involve an adjudication as to the amount due from the individual taxpayer. The choice of a specific tax by the legislature does not, however, deprive the individual taxpayer of due process of law, for so far as the determination of a question of fact is incidentally involved in the course adopted, that determination is a necessary consequence of the exercise of the taxing power."

Where the legislature fixes the tax or the standard of measurement no notice is necessary, the result being merely a mathematical conclusion.

> English v. Wilmington, 2 Marvel (Del.) 63, 37 Atl. 158.

In Hagar v. Reclamation District No. 108, 111 U. S. 701, 28 L. Ed. 569, the Court said:

> "Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business) and generally, specific taxes on things or

persons or occupations. In such cases the Legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard or bushel or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind or at a particular place, such as keeping a hotel or restaurant, or selling liquors or cigars or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the State, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it."

Voluminous citations to this proposition might be listed but we conceive that this is not necessary since the point is too sell settled. For further authorities we refer to the annotation to the case of State of Nebraska v. Several Parcels of Land, Lawyers Reports Annotated 1916E, at page 5.

Judson on Taxation, Section 341, says:

> "The Statute does not deny to the plaintiff-in-error the equal protection of the laws under the Fourteenth Amendment to the Federal Constitution."

Cooley on Taxation, Volume 1, Third Edition, page 75 uses the following language:

> "The inhibition of the amendment was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation but it does not prohibit special legislation, or legislation that is limited either in the objects to which it is directed, or by the territory within which it is to operate.
>
> "Nor does it preclude the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another to a different rate—distinguishing between franchises, licenses and privileges, and visible and tanglible property, and between real and personal property."

In discussing special methods of assessment, Judson on Taxation, Section 509, states as follows:

> "The law-making power determines all questions of discretion or policy in ordering, assessing and collecting taxes, and determining the necessary rules and regulations. The mere fact that a special procedure is provided for the taxation of a certain class of property, different from that provided for another class or from the general procedure in taxation, will not make the act providing such special procedure invalid. These are matters of detail, within the legislative discretion.
>
> "The power to classify property for taxation on any reasonable basis includes also the power to provide special methods of assessment for the different classes. Thus a statute of a State assessing railroad property, which requires the company to return the length of the road within and without the State, values the property within as an entirety, and distributes to each county and city along the line its mileage proportion, is valid. The court said that there was no merit in the objection that the defendants were denied the equal protection of the laws. The Constitution does not forbid the classification of property for the pur-

poses of taxation and the valuation of different classes by different methods. The fact that the legislature had chosen to call a railroad, for the purposes of taxation, real estate, did not identify it with farming lands and town lots in such a sense, as to require the employment of the same methods and machinery of the law to ascertain the value for taxation."

Judson, 503, further says:

"The right to specialize and classify for taxation must be exercised subject to the restrictions in the State constitution, which in many cases requires all property to be taxed according to a uniform rate, and thus precludes the subjection of any property to a different rate. Under such constitutional restrictions it may become important to determine whether a tax is levied as a property tax or as a license tax upon the business conducted or privilege exercised. If a property tax, it must be levied, under the rule of uniformity, according to the rate limited by the constitution; while, if a business or privilege tax, it is not subject to such requirement, though it must be uniform upon all of the same class of subjects. The equal protection of the laws guaranteed by the Federal constitution has of course no relation to such specific restrictions in State constitutions. It recognizes the right to specify and classify whether in property or business taxation, and only requires that the classification be on a reasonable basis and that the tax be uniform and equal as to all of the same class."

In Heisler v. Thomas Colliery Co., 260 U. S. 245, 67 L. Ed. 237, it was held that the difference between bituminous and anthracite coal form a just basis for their different classification under tax laws. The Court quoted from the case of Watson v. State Comptroller, 254 U. S. 122, 65 Lawyers Edition 170:

"Any classification is permissible which has a reasonable relation to some permitted end of

> Governmental action. . . . It is enough for instance if the classification is reasonably founded in the purposes and policy of taxation."

In Oliver Iron Mining Company v. Lord, 262 U. S. 172, 67 L. Ed. 929, the tax upon the business of mining ore was held to be valid although no smaller tax was imposed upon mine owners doing development work without removing ore. The Court said:

> "Consistently with both provisions the legislature of the state may exercise a wide discretion in selecting the subjects of taxation, particularly as respects occupation taxes. It may select those who are engaged in one class of business and exclude others, if all similarly situated are brought within the class and all members of the class are dealt with according to uniform rules."

There can be no doubt that all parties similarly situated are treated equally under the statute in question. Not only are telegraph companies included but also electric light and telegraph companies are included within the same classification.

It is submitted that the difference existing between the nature of the business of the telephone, telegraph and electric light companies and companies such as street railways, gas companies and water companies are without the necessity of further argument so great as to show conclusively the reasonableness of the classification.

The Decision of the Supreme Court of Delaware Declaring the Tax to be a Tax for the License or Privilege of Using the Streets is Binding Upon the Federal Supreme Court.

In Brown-Forman Company v. Kentucky, 217 U. S. 563, 54 L. Ed. 883, the Court said:

> "But the Kentucky court of appeals has construed the act as not a property tax, but as one

> imposing a license or occupation tax upon the business. . . . Such a construction and interpretation of the statute here involved, by the highest court of the state, should be accepted as definitely determining that the tax complained of is not a property tax, but a license tax imposed upon the doing of a particular business plainly subject to the regulating power of the state."

In Mackay Telegraph & Cable Company v. Little Rock, *supra,* which was a case involving a municipal license tax upon poles of a telegraph company, the Court said:

> "The Supreme Court of the State as we read its opinion dealt with the pole fees not as an agreed compensation for the franchise but as a license tax. Consequently we will—indeed must, for present purposes—so regard it."

We have no fault to find with the authorities cited by the plaintiff-in-error for the proposition that the Supreme Court is not bound by the characterization of a statute by the highest court of the state so far as that characterization may bear upon its constitutional effect, but we submit in this case the Supreme Court of Delaware did more than merely give the tax in question a characterization as a license tax. The Act of 1907 admittedly imposed a license tax upon telegraph companies for the occupation of the streets of the city. The Act of 1913 operates to repeal all acts or parts of acts inconsistent therewith. If the Supreme Court of Delaware had interpreted the Act of 1913 as imposing a property tax, the Act of 1907 would not have been repealed thereby and both acts would be in full force and effect at the present time as is stated by the Supreme Court of Delaware in its opinion. (Record, p. 20.)

The Supreme Court of Delaware, however, in interpreting the Act of 1913 held that it was in substi-

tution of the Act of 1907, imposed by its terms the same kind of a tax and therefore effected a repeal of the 1907 Act. In other words what the Supreme Court of Delaware did in interpreting the Act of 1913 was to construe its operation and effect in relation to the former act. In so doing we submit the Supreme Court of Delaware closed the question to further review by this court.

It would seem to be well established that where the highest court of a state has construed the operation and effect of a state statute and in so doing has so limited its construction as to obviate the objection that it violates the Federal Constitution, that the Federal Supreme Court in passing upon the constitutionality of the statute will follow the construction placed thereon by the state court instead of giving it an independent and broader construction, it might render it violative of the Federal Constitution.

Smiley v. Kansas, 196 U. S. 447, 49 L. Ed. 546;
Gatewood v. North Carolina, 203 U. S. 531, 51 L. Ed. 305;
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 55 L. Ed. 369.

Wherefore the defendant-in-error submits that the judgment of the Supreme Court of Delaware should be affirmed.

Respectfully submitted,

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